No. 2936

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

UNITED STATES STEEL PRODUCTS COMPANY, a Corporation,

Plaintiff in Error,

vs.

POOLE-DEAN COMPANY, a Corporation,

Defendant in Error.

## Brief on Writ of Error for Defendant in Error

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## STATEMENT.

In order that respondent's position may be clearly set forth, the following statement is made.

This is an action upon a sub-contract, wherein the Poole-Dean Company, hereinafter referred to as the respondent, and the United States Steel Products Company, hereinafter referred to as the appellant, were the parties. The appellant obtained from the Grand Trunk Pacific Railway Company, some time in the late fall

of 1912, a request for furnishing and erecting steel to be used in the railroad terminal buildings and a floating dry dock at Prince Rupert, British Columbia. This contract was awarded appellant. Appellant not being entitled to operate in Canada, was compelled to sub-let the erecting of the steel. The appellant, before obtaining the contract from the Railroad Company, had its representative, Mr. Overmire, get into communication with Mr. Poole, the respondent Company's representative, and these two men made the sub-contract upon which this action is predicated. That this contract might be understood, Mr. Overmire and Mr. Poole went to Prince Rupert, B. C., to look over the site of the proposed work. At Prince Rupert they met Mr. Pillsbury, the resident engineer of the Grand Trunk Pacific Railway Company, and Mr. Pillsbury at that time agreed that if the appellant received the contract for the furnishing and erecting of the steel that it would be given sufficient space in which to properly sort and assemble the steel entering into the construction of the terminals, and also that the undertaking would be so planned that when appellant was instructed to begin furnishing and erecting the steel, it could continuously operate until the completion of the work, it being contemplated both by Mr. Pillsbury and Mr. Overmire that considerable space would be necessary for the proper carrying on of this work and that as Prince Rupert, at that time was a small village, many miles from the labor markets, it would necessitate the importing of labor by the appellant from the labor centers of British Columbia at a material expense. Mr. Overmire, upon reaching this understanding with Mr. Pillsbury, in turn, informed Mr. Poole substantially to

the same effect and agreed to furnish the respondent with adequate space for the sorting and assembling of the steel to be erected by the respondent and to only instruct respondent to begin work when respondent could continually keep at the work and thereby obviate the necessity of shutting down, tying up equipment and the likelihood of transporting labor back and forth several times from Vancouver and other labor centers to Prince Rupert. At this time there was an examination of the engineer's plans and a discussion as to the method by which the appellant would ship the steel from its mills to the work site. It was agreed that the steel would be completely fabricated at the shops of appellant. Then Mr. Poole and Mr. Overmire returned to Portland, and on their return Mr. Poole made up a price of $18.00 per ton which was to be paid for the erecting of the steel. At numerous times Mr. Poole made requests upon Mr. Overmire that the understanding which they had come to at Prince Rupert with reference to fabrication, space and the commencement of the work, be reduced to writing, but the requests were at all times evaded, with the result that there was never any part of the understanding reduced to writing except that $18.00 per ton should be charged for the erecting, riveting and painting of the structural steel. (See Pl. Ex. "A," Tr. p. 55; Pl. Ex. "G," Tr. p. 68; Def. Ex. 2, Tr. p. 92; and Def. Ex. 3, Tr. p. 93.) The substance of these letters is substantially as follows:

(Plaintiff's Exhibit "A"—respondent to appellant, November 16th, 1912.)

"We propose to furnish all necessary labor and

equipment to erect, rivet and paint the structural steel to be used in buildings and smoke stack for the Grand Trunk Pacific Railway at Prince Rupert, B. C., for the sum of Eighteen ($18.00) Dollars per ton of 2000 pounds. Material to be delivered on docks at building sites."

(Plaintiff's Exhibit "G"—appellant to respondent, March 24th, 1913.)

"Referring to your conversation with our Mr. Overmire and the writer relative to your contract covering erection feature for the Grand Trunk Pacific buildings at Prince Rupert, B. C., it is understood that we used your figures in connection with our proposal on this work, and consequently you will receive the order for doing this erection.

As to the deliveries, wish to advise that our schedule contemplates commencing shipment from the plant in June and complete about the middle of September, but we undoubtedly will have to figure about four to four and one-half months from the time material leaves the plant until it reaches Prince Rupert.

Our formal contract with you for the erection will be drawn up as soon as conditions permit."

(Defendant's Exhibit 2—respondent to appellant, November 7th, 1913.)

"In looking through our files we find that we have misplaced copies of our ORIGINAL PRO-

POSALS on the main building and wings of the dry dock at Prince Rupert.

It is our understanding we are to erect, rivet and paint two coats on main buildings for $18.00 per ton of 2000 pounds; on wings of dry dock we are to erect, rivet and caulk for $18.00 per ton of 2000, pounds all material to be delivered to us on dock at building site.

If the above is in accordance with your understanding we will ask that you confirm same at your earliest convenience in order that our records may be complete."

(Defendant's Exhibit 3—appellant to respondent, November 11th, 1913.)

"We have your letter of the 7th instant which states that you have misplaced copies of your ORIGINAL PROPOSAL on the buildings and wings of the dry dock on the above subject.

Your understanding is, in accordance with ours that: you are to HAUL, erect and rivet the steel for the buildings, for Eighteen Dollars ($18.00) per net ton of 2000 pounds, which includes your furnishing and applying two coats of paint, as per specifications; also that you are to HAUL, erect, rivet and caulk the steel work for the wings of the dry dock, for Eighteen Dollars ($18.00) per net ton of 2000 pounds.

All steel work to be delivered to you on dock at Prince Rupert, B. C."

From Plaintiff's Exhibit "A" it will be noted that the price of $18.00 per ton is mentioned for the erecting, riveting and painting of the steel used in the buildings and smoke stack. Plaintiff's Exhibit "G" shows that Messrs. Poole and Overmire apparently had a conversation and came to some sort of a verbal contract covering the erection of the Grand Trunk Pacific buildings at Prince Rupert, and that in addition to the $18.00 per ton, that some sort of an agreement had been reached as to the deliveries, and it clearly shows from the following language:

> "Our formal contract with you for the erection will be drawn up as soon as conditions permit."

that there were still matters pending and unfinished upon which an agreement was necessary. This is more clearly shown by Defendant's Exhibit 2 (Tr., p. 92) in which Poole-Dean Company requests that for the completion of their files they be furnished with the ORIGINAL proposal on the main buildings and WINGS OF THE DRY DOCK at Prince Rupert. It is in this letter that the first mention is made of the dry dock and this letter also mentions that there is caulking to be done in addition to erecting and riveting work on the dry dock.

Then referring to Defendant's Exhibit 3 (Record, p. 93), the appellant replies and adds to its reply a new feature. In other words, in addition to erecting, riveting and caulking the steel work for the dry dock, the word HAUL is injected.

About a week after this last letter (Defendant's Exhibit 3, Tr., p. 93) was received by the respondent, the respondent was notified by the appellant that the first consignment of steel was about to be unloaded at the terminals at Prince Rupert and to be there with workmen to receive the same. Mr. Dean, of the respondent company, had been selected to oversee the work at the building site and about the 19th of November, in company with Mr. Poole, went to Mr. Overmire's office and complained that the detail sheets, which were then seen for the first time, showed that the steel for the buildings at Prince Rupert was going to arrive incompletely fabricated, necessitating extensive shop work at the building site. Mr. Overmire replied that whatever the condition of the steel appeared to be it made no difference inasmuch as the matter would be taken care of by the appellant in accordance with appellant's and respondent's agreement that the steel would be completely fabricated, and that the appellant had anticipated this and taken the condition of the steel into consideration in submitting its general bid for the furnishing and erecting of the steel to the Grand Pacific Railway Company, and Overmire agreed to pay for the additional fabricating.

Mr. Dean, upon arriving at Prince Rupert, obtained his employes at Vancouver, B. C., and proceeded to work, keeping an exact record of the cost of the shop-work that it was necessary to do at the building site in erecting the buildings, and a claim was thereupon made against the appellant for the sum of $3330.69. This included the extra work on the steel entering into the

construction of the cold storage building, ship shed, blacksmith, machine and boiler shop, power house and foundry buildings. As the work progressed it developed that owing to the fact that the appellant had given the respondent premature instructions as to when to begin work at Prince Rupert, that the respondent was going to complete its work on the erection of the buildings before the erection work upon the pontoons for the floating dry dock would be ready, and that there would be a resulant tying up of the respondent's equipment and laying off of workmen for a period of several weeks, all in violation of the appellant's contract with the respondent. This occurrence resulted in a claim for $918.00 covering the expense of laying off the workmen, and $215.00, representing approximately 6% per year on the value of the equipment tied up during the delay.

When work was resumed December 1st, 1914, on the pontoons of the floating drydock it was apparent that the appellant had violated its agreement with the respondent wherein it agreed to furnish the respondent with sufficient space for the purpose of sorting and assembling the steel to be used in the floating dry dock, with the result that it became necessary for the respondent to handle and rehandle the steel, an accurate account of the cost of which was kept by the respondent, and a claim of $2459.00 made.

In addition to the above amounts the appellant ordered $400.70 worth of extra work. It is admitted by the appellant that this work was extra and was not contemplated by the appellant and respondent in their con-

tract, but appellant claims this amount should have been charged direct to the Grand Trunk Pacific Railway Company and not to the appellant.

So that the claims of the respondent are:

(1) That it is entitled to $3330.69 for shop work done in the field by it on the building steel and not originally contemplated in respondent's agreement with the appellant. This shop work does not include steel for the pontoons.

(2) That it is entitled to $918.00 and $215.00 in being prevented from continuously performing the work, in violation of the agreement with the appellant.

(3) That it is entitled to $2459.00 covering extra handling of the structural steel used in the erection of the wings of the floating dry dock, due to appellant's breach of agreement in failing to furnish adequate sorting space. This excludes extra handling of the steel for the buildings.

(4) That it is entitled to $400.70 for extra work.

It is essential to keep in mind throughout the consideration of this case that the respondent is a sub-contractor of the appellant, and it is so admitted in Paragraph III of Respondent's Answer (Tr., p. 19), and that the respondent had no contractural relations whatever with the Grand Trunk Pacific Railway Company. In fact, throughout the work the respondent herein did not know whether the Grand Trunk Pacific Company or the Grand Trunk Pacific Development Company were the parties with whom the appellant had its contract.

The question at issue therefore is, What was the contract entered into between the appellant and the respondent? It is appellant's contention that the letters heretofore mentioned and the specifications comprised the entire contract as concluded, while it is the respondent's contention, and it was the theory of the trial court, that the letters in question are but a part of the contract and do not include the whole contract, that it was alleged and proved the parties entered into, and that therefore the trial court was justified in leaving to the determination of the jury what the contract in reality was.

## ARGUMENT.

This action is based upon contract and the principal disagreement between appellant and respondent is as to whether or not the trial court, in holding that the contract was not completely contained in certain letters, and specifications, erred in leaving to the jury, as a mixed question of fact and law what the real contract was. The contract was made by Otho Poole, representative of the respondent company, and C. C. Overmire, representative of appellant company, and it is from the testimony and subsequent conduct and admissions on the part of the appellant that the real agreement between the parties hereto is arrived at. It is clearly shown by the testimony that in the fall of 1912, Overmire and Poole contemplated that this work was coming up and made a trip to Prince Rupert, B. C., for the purpose of intelligently understanding the proposed work. At that time the appellant had not obtained any contract from

the Grand Trunk Pacific Railway Company, but like the respondent, was endeavoring to ascertain the situation and the approximate cost of the work. The contract for the furnishing and erecting of the steel, as far as the Grand Trunk Railway was concerned, was let in one contract to one contractor, namely, the appellant, and the appellant, because of inability to operate in the Province of British Columbia, contemplated sub-letting the erection of the steel. Mr. Overmire therefore saw Mr. Pillsbury, the railway company's representative at Prince Rupert, and was assured that there would be adequate space for the proper sorting and assembling of the steel which was to be erected, and the question of deliveries was also gone into, so that the work could, after it was once started, be continuously carried on. It must be borne in mind that Prince Rupert was a small, isolated village; that idle equipment could not be utilized elsewhere during a shut-down, and that mechanics necessary for the erection of the structural steel would all have to be returned to and transported from Vancouver, B. C., and other labor centers of Canada.

After the contract for the furnishing and erecting of the steel was obtained by the appellant the respondent was thereupon given the sub-contract for the erection of the steel, in accordance with the agreement made by Mr. Overmire. The parties, therefore, are to be considered as contractor and sub-contractor; such was the understanding disclosed by the testimony and also from the pleadings of the appellant itself.

Clearly the entire contract was not embraced in

writings, as is so strenuously urged by appellant, for the letters themselves are incomplete and mere memoranda leading up to and forming but a part of the larger contract. Plaintiff's Exhibit "A" (Tr., p. 55) is as follows:

> "We propose to furnish all necessary labor and equipment to erect, rivet and paint the structural steel to be used in buildings and smoke stack for the Grand Trunk Pacific Railway at Prince Rupert, B. C., for the sum of Eighteen ($18.00) Dollars per ton of 2000 pounds. Material to be delivered on docks at building sites."

The next writing in connection with this contract is Plaintiff's Exhibit "G" (Tr., p. 68) which is as follows:

> "Referring to your conversation with our Mr. Overmire and the writer relative to your contract covering erection feature for the Grand Trunk Pacific Buildings at Prince Rupert, B. C., it is understood that we used your figures in connection with our proposal on this work, and consequently you will receive the order for doing this erection.
>
> As to the deliveries, wish to advise that our schedule contemplates commencing shipment from the plant in June and complete about the middle of September, but we undoubtedly will have to figure about four to four and one-half months from the time material leaves the plant until it reaches Prince Rupert.
>
> Our formal contract with you for the erection will be drawn up as soon as conditions permit.

Trusting this letter will give you the necessary authority for making your arrangements for your part of the work, we remain."

Then comes Defendant's Exhibit 2 (Tr., p. 92) as follows:

"In looking through our files we find that we have misplaced copies of our ORIGINAL proposals on the main building and WINGS OF THE DRY DOCK at Prince Rupert.

It is our understanding we are to erect, rivet and paint two coats on main buildings for $18.00 per ton of 2000 pounds; on wings of dry dock we are to erect, rivet and caulk for $18.00 per ton of 2000 pounds, all material to be delivered to us on dock at building site.

If the above is in accordance with your understanding we will ask that you confirm same at your earliest convenience in order that our records may be complete."

Then follows Defendant's Exhibit 3 (Tr., p. 93), which is as follows:

"We have your letter of the 7th inst. which states that you have misplaced copies of your ORIGINAL proposal on the buildings and wings of the dry dock on the above subject.

Your understanding is, in accordance with ours that: you are to HAUL, erect and rivet the steel

for the buildings, for Eighteen Dollars ($18.00) per net ton of 2000 pounds, which includes your furnishing and applying two coats of paint, as per specifications; also that you are to haul, erect, rivet and caulk the steel work for the wings of the dry dock, for Eighteen Dollars ($18.00) per net ton of 2000 pounds.

All steel work to be delivered to you on dock at Prince Rupert, B. C."

It will be noted from Exhibit "A" that merely the furnishing of labor and equipment necessary to erect, rivet and paint the structural steel to be used in the buildings and smoke stack at $18.00 per ton of 2000 pounds, was required, material to be delivered at the building sites. The testimony is that in addition to the first letter there was oral conversation and that the $18.00 per ton feature of the letter was accepted and that figure used by Mr. Overmire (Tr., p. 56). In fact, there is testimony of Mr. Overmire to the effect that there were two sets of specifications, for the witness Overmire testified "that the original specifications provided that between the pontoon and where the caisson sets down on the pontoon, there was to be canvas belting, with tar; that Poole's written bid did not mention that point; that as a matter of fact Poole's first bid covered painting of all the buildings, and the dry dock * * * (Tr., p. 325).

There is no letter in evidence showing that Poole made more than one bid, but there is Overmire's testimony that there was more than one bid.

The next letter, under date of March 24, 1913 (Plaintiff's Exhibit "G," Tr., p. 68) refers to the conversation relative to the contract and states that the figure of $18.00 was used by the appellant in basing its bid to the railway company for the erecting of the steel. The question of deliveries is also gone into in this letter and it is then stated that the formal contract for the erection will be drawn as soon as conditions permit, inferentially showing that the agreement was not wholly within the writings.

The next letter in point of time is Defendant's Exhibit 2 (Tr., p. 92), which is simply a letter from the respondent asking for copies of the ORIGINAL proposals on the main buildings and DRY DOCKS. It is in this letter that the dry dock is first mentioned, as the other two letters simply mentioned the terminal buildings.

The next letter in point of time is Defendant's Exhibit 3 (Tr., p. 93), in which the appellant acknowledged receipt of inquiry of respondent for copies of the ORIGINAL proposals for the files, and confirms the letter of inquiry written by the respondent, and in addition to riveting the steel for the buildings it is stated that the respondent is to HAUL. So that in none of these letters are the same terms used, but in each case there is either an addition to the original letter, or the letter is modified. Besides this, the testimony shows that appellant herein must have made more than one proposal to the Grand Trunk Pacific Railway Company for the furnishing and erecting of the structural street (Overmire's testimony, Tr., p. 296).

Upon the appellant's theory of this case, these four letters, together with the specifications, would comprise the entire contract, but it is submitted that the trial court was correct in holding that, as a matter of law, it could not conclude that these four letters and the specifications comprised the entire contract, because the letters themselves are not complete and show that they are but a small part of a larger transaction which is embraced in the oral agreement, and in addition to this, the witness, Overmire (Tr., p. 324, et seq.) stated that the specifications, so far as appellant and respondent sub-contractor were concerned, were not followed, in that

(1) Specifications required work to begin on dry dock wings when three pontoons were floated, but it was agreed and respondent began work when two pontoons were floated;

(2) Specifications required appellant to have a representative continuously on the work, but appellant had no representative on the work continuously;

(3) Specifications required a certain steel smoke stack, but it was agreed by appellant and respondent that the material to be used should be concrete;

(4) Specifications required a large, certain sized air compresser, but appellant and respondent agreed to a smaller size and the respondent used a smaller sized air compresser than required by the specifications;

(5) Specifications required an English patent paint, but appellant and respondent agreed upon a dif-

ferent paint and respondent did not paint the steel with the specified patented English paint;

(6) Specifications required respondent to furnish canvas belting with tar on pontoon caisson, but appellant and respondent agreed this was not to be in the contract, and respondent did not furnish canvas belting with tar on the pontoon caissons;

(7) Specifications required respondent to furnish ballast for pontoons, but appellant and respondent agreed not to furnish ballast, and respondent did not furnish ballast for the pontoons;

(8) Specifications required respondent to test pontoons upon their completion, but appellant and respondent agreed not to test pontoons, and the respondent did not test the pontoons upon their completion.

The testimony shows clearly that the contention of the respondent that the contract here was oral and that there was an agreement between it and the appellant with reference to the furnishing of space at the building site at Prince Rupert and with reference to the time at which the work was to begin is correct, for not only does Mr. Poole testify to this effect, but that there was such an understanding is clear from the fact that Mr. Overmire, in letters to appellant company, informed the company that such was the agreement and therefore it is reasonable to believe that in as much as the appellant did have an agreement with the Grand Trunk Pacific Railway Company, it in turn did make such an agreement with the respondent herein. Mr. Overmire

says in his letter to the appellant company, dated May 29, 1914 (Plaintiff's Exhibit "V," Tr., p. 311) in referring to a conversation had between Mr. Overmire and Mr. Donnelly at Seattle:

> "I stated to him (Donnelly) the promises which were made to me by Mr. Pillsbury as to how we could expect to find the site when the steel should arrive."

Also, in another letter from Mr. Overmire to the appellant (Plaintiff's Exhibit "X," Tr., p. 316) the following language is used:

> "I, at that time, took up with Mr. Pillsbury the capacity of the dock, in order that I might satisfy myself that all of the construction would be heavy enough to permit of the storage of the material as unloaded from the ships.
>
> In this connection, I asked that our bid contain a clause that the owners were to supply fill roadways or trestles to the various building sites."

(See, also, Plaintiff's Exhibit "W," Tr. 312.)

Mr. Overmire also wrote a letter to appellant under date of March 6, 1914 (Plaintiff's Exhibit "T," Tr., p. 303) in which this language is used:

> "Our bid was based upon information by Mr. Pillsbury that the docks would be completed and could be used for unloading and storing material. Because of the fact that we could not store the material on the dock it could not be sorted as unloaded."

The foregoing letters deal principally with the question of space. There was, however, an understanding between the appellant and the Grand Trunk Pacific Railway Company, and it is reasonable to believe therefore that this same understanding was embodied by the appellant in its sub-contract with the respondent, for Mr. Overmire writes to the head office of the appellant company at New York under date of July 20th, 1914 (Plaintiff's Exhibit "U," Tr., p. 308):

> "Mr. Poole is going to be put under considerable expense laying off crews and having his equipment tied up at Prince Rupert for the next six months, and as this is due wholly to non-deliverance of the substructures in proper condition to begin erection, I think it would be in order to notify the Railroad Co. that we shall expect an extra covering the cost of idle equipment and transportation of men because of the enforced layoff."

Mr. Overmire also writes, under date of January 13th, 1914 (Plaintiff's Exhibit "S," Tr., p. 298):

> "I have to advise that I have had several talks with Mr. Poole during the last few days regarding the difficulties that he is encountering at Prince Rupert and which are accounted for because of failure of the Railway Company to provide facilities and do certain work in accordance with their promises to us when we were at Prince Rupert on this work."

It will be seen, therefore, from the foregoing, that no court as a matter of law could properly hold that

the four letters comprising Plaintiff's Exhibits "A" and "G," and Defendant's Exhibits 2 and 3, together with the specifications, were the contract entered into between the appellant and respondent herein. Especially is this true when it is shown that the letters are incomplete in themselves and form but a part of the larger transaction which constituted the contract, and when it is further shown by letters and by testimony of the respondent witnesses that it was agreed that the specifications be not complied with in many respects.

It is, of course, a rule settled beyond controversy that parole contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written contract, but this rule does not apply in cases where a part only of the contract was reduced to writing.

> American Bridge & Contract Co. v. Bullen Bridge Co., 29 Ore. 549; s. c. 46 Pac. 138 (Ore.)

This same rule of law is recognized by the federal courts. The Supreme Court in the case of Rankin v. Fidelity Ins. Trust & Savings Deposit Co., 23 Sup. Ct. Rep. 553, in discussing this question say:

> "Although the construtcion of written instruments is one for the court; where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury."

(Citing) Brown v. M'Gran, 14 Peters 479.

And in the case just cited it was said by Mr. Justice Story:

> "There certainly are cases in which, from the different senses of the words used or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects, and intentions, and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed."

## THE PLEADINGS.

The claim of the respondent in this action is set forth in five separate causes of action.

### Cause of Action I.

This covers the claim for extra shop work done in the field because of the failure of the appellant to have the steel delivered properly fabricated as agreed. The appellant admits that this question was one properly referable to the jury. (See Appellant's Brief, p. 44.) This claim is confined exclusively to the steel used in the buildings and does not include the steel used for the pontoons of the floating dry dock, which steel arrived in the condition agreed upon. This distinction is clearly pointed out by the court in its instructions to the jury. (See, particularly, Tr., p. 363, 2nd Par.)

Cause of Action II.

This cause of action covers damage to the plaintiff occasioned by the tying up of respondent's equipment from September 1st, 1914, to November 5th, 1914. It was sought in this cause of action to recover the reasonable rental, but the court held that the damages in this case would be limited to 6% on the valuation of the equipment for the time it was idle. This phase of the case was also clearly covered by the court in its instructions. (Tr., p. 370, Pars. 2 and 3.)

Cause of Action III.

The third cause of action is for the loss suffered by the respondent in making it necessary to tie up its equipment from September 1st to November 5th, 1914, and representing the expense in returning the laborers to their homes upon the shutting down of the work and bringing them back upon the commencement of the work again. This, too, was clearly pointed out by the court in its instructions. (Tr., p. 371.)

Cause of Action IV.

The fourth cause of action covers extra sorting and handling of the steel for the dry dock. This does not include the extra handling of steel for the other buildings. This, too, was clearly covered by the court in its instructions to the jury. (See Tr., p. 372.)

Cause of Action V.

While the last cause of action is for extra work ordered by the appellant and for which the respondent

seeks to hold the appellant. The court also fairly presented this phase of the controversy to the jury. (See Tr., p. 373.)

The appellant seeks to confine the contract to the four letters comprised in Plaintiff's Exhibits "A" and "G" and Defendant's Exhibits 2 and 3, and the specifications, and thereby to defeat four of these five causes of action. But the Answer of the defendant is inconsistent in its contention in this, that paragraphs VII and VIII provide (Tr., p. 20):

VII.

"It was mutually understood and agreed by and between plaintiff and defendant at the time said contract between plaintiff and defendant was entered into, and said contract between plaintiff and defendant was made upon the express understanding, that defendant should deliver said steel to plaintiff by water transportation, and that said steel should be delivered as completely fabricated as it was defendant's custom to ship by water transportation similar steel for similar work.

VIII.

"Defendant delivered all the steel required by plaintiff under plaintiff's said contract with defendant on dock at Prince Rupert, British Columbia, as completely fabricated as it was defendant's custom to ship by water transportation similar steel for similar work, and defendant in all respects ful-

filled and completed its obligations towards plaintiff under defendant's contract with plaintiff."

By these two allegations the appellant admits that there was an understanding outside of the written letters to the effect that the steel should be shipped to respondent by water transportation and that the steel should be delivered as completely fabricated as was "defendant's custom to ship by water transportation similar steel for similar work." It might occur to one that there is an implication that the steel would be shipped as was customary under similar circumstances, but appellant goes further and alleges that there was a specific agreement, which must have been oral, that the steel should be delivered as completely fabricated as it was "defendant's custom" to fabricate; so that the very allegation of appellant's answer go to show that the contract upon which the respondent brings this action is a contract made up partially of writings and partially of oral agreements and that the trial court, therefore, did not err in leaving the entire matter under proper instructions to the jury.

## THE EVIDENCE.

The appellant's first, third and fourth specifications of error relate to evidence and it is claimed that the witness Poole and the witness Dean should not have been allowed to testify as to the estimated cost of the handling of the steel and the real cost of the extra handling of the steel for the reason that it was contrary to the written contract and an improper way of proving damages.

The first objection, of course, goes to the merits of the controversy in this case and as to whether or not the entire contract was in writing, or whether it consisted of letters and conversations and has been discussed heretofore.

As to the second objection that it is an improper way of proving damages, the respondent respectfully submits that both witnesses, in addition to testifying that the estimate of $.90 for handling and sorting the steel for the dry dock was the basis for their bid, also went further and testified, upon being qualified as experts, that under the circumstances 90c per ton was a reasonable and just charge for handling and sorting steel under similar circumstances. That a charge of $2.28 for sorting steel for work under similar circumstances was $1.38 more than what a reasonable charge under the circumstances really should be; so that the testimony was, therefore, clearly admissible upon that showing and also admissible upon the theory upon which this case was tried by the trial court, namely, that the contract was composed of letters and oral understandings combined.

As to the second and fifth specifications of error, namely, the admissibility of plaintiff's letter dated December 2nd, 1913, known as Plaintiff's Exhibit "L," and also Exhibits "S," "T," "U," "V," "W" and "X," the rule is well known that where a contract was not originally in writing, and the terms of the oral agreement were imperfect and indefinite, the real contract must be largely inferred, as a question of fact, from the subsequent course of dealing.

Whale v. Gatch, 70 Pac. 832 (Ore. 1902).

Specifications of error, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XIX, XX, are, many of them, repetitions and all are based upon the false assumption that the entire contract in this controversy was in writing. As to that part of the specifications dealing with the requested instructions to the court, those that are consistent with the correct theory of this case were either given literally or substantially by the court in the court's instructions to the jury.

Specifications of error XVII and XVIII deal with extra work. It is submitted that the court's instructions covering this item of extra work were correct. The contract was oral, and it was for the jury to determine what the contract and the liability thereunder really was.

With reference to that part of the appellant's brief being a criticism of causes of action No. II and No. III, and contained on page 58, a statement is made that Mr. Poole rushed the work on the buildings and thereby was able to finish them up five weeks ahead of the schedule time, and is, therefore, claiming that more than half of the alleged delay for which he claims compensation was caused by finishing the buildings five weeks ahead of time. Appellant has misread the testimony in this respect, for the testimony was to the effect that it was not the buildings that were finished five weeks ahead of time, and then a consequent delay in waiting for the pontoons. The testimony shows that no extra crews were employed upon the buildings but that after the work on the pontoons was begun, extra employees

were employed upon the pontoons, the work was rushed and the pontoons were completed five weeks ahead of time. (Fey's testimony, Tr., pp. 341, 342, Par. 2, 346; See also, Poole's letter, Plaintiff's Exhibit "I," Tr., p. 75.)

## SUMMARY.

It will be seen, therefore, that appellant received the contract for the furnishing and erecting of the steel upon this work on presumably a low margin as to profit, because of the keen competition on the part of the Canadian Steel Companies, fortified by a protective tariff, and that, therefore, the real purpose of the appellant, from the beginning of the contract here in question, has been to foist upon the respondent, losses which should properly be assumed by the appellant. The testimony clearly shows, in relation to the first cause of action, that certain promises and agreements were made by the appellant with reference to the degree of fabrication of the steel entering into the construction of the buildings; that the appellant apparently found that it would be more profitable for them to breach this agreement, because by shipping the steel incompletely fabricated a material saving could be effected upon the freight, due to the method of computing the same upon a basis if space rather than weight. By this practice the appellant, therefore, attempted, at the expense of the respondent, and was able to effect a material saving.

With reference to the second and third causes of action, it would seem from the testimony that the appellant at the time of entering into the contract with the

Grand Trunk Pacific Railway Co. had clearly anticipated just such contingencies as did occur, namely, an inability to proceed continuously with the work, necessitating shutting down, with the consequent losses.

And in the fourth cause of action it would also seem that the appellant realized the vital necessity of adequate space for the assembling of the dry dock material. And in each of the contingencies alluded to protected themselves by an agreement with the Grand Trunk Pacific Railway Company, so that they could present claims to the Railway Company in the event of the contingencies taking place. For some reason, however, unknown to the respondent, the appellant has not deemed it advisable to come to an issue with the Grand Trunk Pacific Railway Company regarding these claims, but rather, it would seem, prefers to compel this respondent to litigate this matter to enforce payment of respondent's claims.

And in the fifth cause of action the testimony is clear, and it is admitted by both parties, that the work for which payment is sought was extra work, but this work was done at the request of appellant upon a promise of the appellant to pay, and the testimony is clear that any claims presented to the Railway Company were presented to the Railway Company at the request of the appellant, on behalf of the appellant, and for the accommodation of the appellant. And why the appellant as to this claim, as well as to all of the other claims, should expect the respondent in this case to present the respective claims to the Grand Trunk Pacific Railway

Company, with whom it had no contract, full well knowing that it would be necessary to litigate the claims with the Grand Trunk Pacific Railway Company, is beyond comprehension.

It must at all times be remembered that the appellant here was the contractor with the respondent; that the respondent was fearful that disagreements might arise as to what the contract was; was fearful of just such a result as has occurred, and at numerous times had requested that the appellant give it a written contract; and that the appellant, although it made the promise to give a written contract, never fulfilled the promise.

It is, therefore, respectfully submitted that, under the pleadings in this case, the testimony adduced, and considering all the surrounding circumstances, the trial court was correct in its theory of the case and under proper instructions submitted the same to the jury and that the resultant verdict of $7,000 under the law and evidence in the case is correct.

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